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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

ROBBINS TIRE & RUBBER COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Robbins Tire and Rubber Company, prays that a writ of certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Fifth Circuit entered in this proceeding on June 13, 1972; rehearing denied August 24, 1972.

OPINION BELOW

The opinion of the Court of Appeals appears at Appendix pp. 1a-7a. The opinion was amended by letter dated Aug. 24, 1972, Appendix pp. 8a-9a. Denial of rehearing appears at Appendix p. 10a. The opinion,

as corrected, is published in 462 F. 2d 684. No opinion was rendered by the District Court for the Northern District of Alabama on the jury's verdict.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on June 13, 1972. A timely petition for rehearing was denied on August 24, 1972 and this petition for certiorari was filed within ninety days of the last referred to date. This Court's jurisdiction is invoked under 28 USC, Sec. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Internal Revenue Laws authorize the Internal Revenue Service to retain income tax overpayment under provisions of an offer in compromise form, submitted by a taxpayer and accepted by Internal Revenue Service prior to the overpayment, reading as follows:

> "* * * (b) that any and all amounts of money to which the proponent may be entitled under the internal revenue laws, due through overpayments of any tax or other liability, including interest and penalties, made for periods ending prior to or during the calendar year in which this offer is accepted, as are not in excess of the difference between the liability sought to be compromised and the amount herein offered shall also be retained by the United States."?

(2) Whether the Circuit Court exceeded the permissible scope of appellate review in reversing District Court's finding of ambiguity in written documents of compromise between the parties?

(3) Whether judgment on the facts by the Circuit Court deprived Petitioner of the right to trial by jury as provided by Title 28 USC 2402 and guaranteed by Amendment VII, Constitution of the United States?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED[1]

(1) Amendment VII of the United States Constitution.

(2) Title 28, USC 2402 and 1346(a)(1).

(3) Rules 38 and 52(a) of the Federal Rules of Civil Procedure.

(4) Title 26, USC 7122.

STATEMENT OF THE CASE

The United States Tax Court determined that Petitioner had overpaid income tax by $139,189.60 for the taxable year ending September 30, 1964 (52 TC 420 and 53 TC 275). Petitioner filed a plenary suit against Respondent to recover this overpayment which was erroneously collected, with request for trial by jury in the United States District Court for the Northern District of Alabama. Title 28 U.S.C. 2402 and 1346(a)(1).

Admitting the overpayment, Respondent contended that Respondent was entitled to retain the overpayment by reason of the following printed Paragraph 3 of Respondent's Offers in Compromise, Form 656 (Appendix C) submitted by Petitioner and subsequently accepted by Respondent on May 1, 1964:

> "3. In making this offer, and as a part consideration thereof, the proponent (Taxpayer) agrees (a)

[1] Set out in Appendix B, p. 11a.

that all payments and other credits heretofore made to the account(s) for the period(s) covered by this offer shall be retained by the United States; and (b) that any and all amounts of money to which the proponent may be *entitled*[2] under the internal revenue laws, due through overpayments of any tax or other liability, including interest and penalties, *made for periods ending prior to or during the calendar year in which this offer is accepted,* as are not in excess of the difference between the liability sought to be compromised and the amount herein offered, shall also be retained by the United States. Any such refund received after the filing of this offer will be returned immediately to the office of the District Director." (Appendix C)

Petitioner countered that quoted language of Paragraph 3 was ambiguous in the misuse of word "or" and misuse of tense of verbs "entitled" and "made" particularly when considered with the following surrounding circumstances and written documents comprising the compromise settlement:

(1) Petitioners letter of March 12, 1964, [quoted at p. 2a, Appendix A] written at request of Respondent and quoted in Respondent's May 1, 1964 acceptance of Offers in Compromise, stating Petitioner's intention to waive claims for taxable years covered by Offers.

(2) Respondent's *printed* Forms 656-Offers in Compromise dated September 30, 1963, submitted to Respondent on February 21, 1964, designating taxable periods ending September 30, 1963, con-

[2] Emphasis supplied throughout. All reference to record below preceded herein by "R".

taining Paragraph 3 misusing word "or", misusing tense of verbs "entitled" and "made" in a 116-word sentence (Appendix C).

(3) Undisputed evidence that in Key Conference between Respondent officials and representatives of Petitioner, the Respondent officials had stated that collateral agreement would include all restrictions and conditions on Petitioner for periods subsequent to September 30, 1963 (R. 58, Joint Ex. 6-F).

(4) Undisputed evidence that by oral modification between parties, payments of $20,000 made on March 15 and April 15, 1964, were not retained by Respondent but credited to Petitioner's Offers (R-App. 47, 48).

(5) Undisputed evidence that the forfeiture claimed under Paragraph 3(b) of the Offers was never raised in the long detailed trial in the U.S. Tax Court until after the $139,189 overpayment in favor of Petitioner had been determined by the Tax Court (R-Joint Ex. 1).

(6) Undisputed evidence that Respondent's frequently revised printed Form 656 was designed for use in respect to seven types of federal taxes, different taxable entities, and different prescribed periods for taxation (R-App. 77, Tr. 137, App. 68-71).

(7) The Tax payments involved had not been "made"; the taxpayer was not "entitled"; and the overpayment was not in existance on May 1, 1964, —date of acceptance, ($82,337.65 paid on December 16, 1964, after close of Petitioner's fiscal year

ending September 30, 1964, and balance paid on March 16, 1965, after close of calendar year). (R. Stipulation Joint 1-A)

(8) The unreasonable result produced by the Paragraph 3(b) waiver in that had Petitioner correctly claimed deduction there would have been no waiver.

At trial and after considering the foregoing circumstances, documents and hearing evidence submitted by the parties, United States District Judge Frank H. McFadden determined that the correct application of both the Federal and Alabama law required the submission of the intentions of the parties to the jury. The jury found for Petitioner.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the District Court for treating the contract documents as ambiguous and in submitting the issue to the jury. In so doing, the Court of Appeals concluded that "reasonable men" could not reach more than one conclusion in the interpretation of the documents and that there was no issue of fact for the jury. Accordingly, the District Court was instructed to enter a direct verdict for Respondent. (Appendix A, p. 7a)

REASONS FOR GRANTING THE WRIT

This case involves a matter of significant importance to taxpayers in general, and a substantial injustice to Petitioner in particular.

However, this is a case where taxpayer was successful both in the Tax Court and the District Court, yet the Circuit Court has permitted the Respondent to prevail upon and perpetuate an oppressive interpretation of

its printed offer in compromise, Form 656 to the prejudice of both Petitioner and tax payers in general. Indeed it is inconceivable that when Form 656 was initially prepared it had the intended meaning ascribed by the Circuit Court.

In referring to Paragraph 3 (Form 656), the Circuit Court states that it would have to be reasonable to read the paragraph [3 (b)] as having given Taxpayer two distinct options—"Either to relinquish to the United States all overpayment claims for the periods ending prior to the year in which the Offer was accepted *or* to give up any overpayment it might make for the calendar year during which the Offer was accepted." Would not an interpretation be more reasonable giving effect to the general purpose of the offers in compromise: To settle by compromise all tax liabilities through September 30, 1963? (Title 26 USC 7122; Williston on Contracts, 3rd Edition, Section 619, Page 733).

Pretermitting for the moment misuse of the particle "or", the only way grammatically that the Form 656 can support the above construction placed upon it by the Circuit Court is to read the words *"made"* and *"entitled"* as if these words did not only relate to overpayments that had already been made by the Petitioner at the date of settlement; but also to payments *"to be made"* for taxable periods including the "calendar year" of settlement. The Circuit Court by implying that the verb form used is capable of both past and future tense affords the government something that ordinary litigants would never expect in resolving their differences by settlement. Here, the overpayments were not even in existence at the settlement date.

Paragraph 3 does not purport to prohibit taxpayers from taking lawful deductions to which they are

entitled under the Internal Revenue Code. Therefore, to construe Paragraph 3 to forfeit an overpayment resulting from an inadvertent failure to take a deduction is incongrous. If the opinion is permitted to stand it would be a warning to all tax practitioners preparing returns for years in which compromises are made under section 7122 to advise the taxpayer to take every conceivable deduction—borderline and otherwise—in order to prevent forfeitures.

This raises an important question of national policy. The considered effect in this case is that a taxpayer who is given a right by Congress to recover an overpayment of tax actually made after the date of settlement is subject to a burden no other taxpayer suffers despite the fact that the controversy was theoretically ended. The government is given a windfall of the taxpayer's subsequent erroneous overpayment—simply because the correct deductions were not claimed. If the correct deductions had been claimed the issue would never have arisen.

An opinion of this Court is needed to more clearly delineate the respective functions of the trial court, jury and appellate court in the interpretation of contracts. In *Miller* v. *Baum*, 400 F.2d 176 (5th CCA, 1968), a breach of compromise settlement agreement case, this Circuit Court rendered the following admonishment to the District Courts: "This Court is committed to the proposition that the entry of an order granting a motion for a directed verdict for a defendant must be reversed if there is any evidence which would have supported a verdict in favor of the plaintiff."

It is evident that the Circuit Court has substituted its judgment for that of the District Court and jury and

that this is a recurring problem meriting a definitive decision by this Court implementing its quoted statement from the *Duberstein* case cited *infra*. There is an unwarranted lack of consistency in the decision involving the interpretation of written documents. See Rules 38 and 52(a), Federal Rules of Civil Procedure.

The defense by Respondent and the replication of ambiguity by Petitioner brought into play a multifaceted agreement between the parties under offers in compromise by Petitioner and the acceptance thereof by Respondent under the authority of Title 26, USC 7122. Accordingly, the issues tried revolved around the interpretation of the written documents and surrounding circumstances. Thus, we have both the finding of ambiguity by the District Court and the Jury finding as to the intentions of the parties.

Conflicts between judges in the interpretation of contracts, as to what is a matter of fact or matter of law, is a paradox meriting clarification by this Court. A paradox perpetuated by our courts and woven into our common law directly affecting the right to trial by jury in civil cases.

As here, the trial judge concludes that more than one reasonable meaning can be ascribed to the contracts between the parties, with the appellate court disagreeing by concluding that there is only one reasonable meaning to ascribe to the same documents. Is this to say that the mind of a trial judge is unreasonable and only the minds of appellate judges are reasonable? Or, is it not proof of ambiguity by virtue of the disagreement between the judges?

This Court has emphasized that appellate review is quite restricted where a jury has tried the matter upon

correct instructions, "the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue." *Commissioner* v. *Duberstein,* 363 U.S. 278. In *Duberstein* this Court also stated: "Where the trial has been by a judge without a jury, the judge's findings must stand unless 'clearly erroneous.' Fed Rules Civ Proc. 52(a). 'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " The Court has also noted in *Beacon Theaters, Inc.* v. *Hon. Henry C. Westover,* 359 U.S. 507, 501, that:

> " * * * Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Corbin on Contracts, 3rd Edition, Section 554, Page 222: "Whether we describe this matter as a question of fact or a question of law, it is necessary to find some test for determining whether it is for the judge to determine rather than for the jury. As in the case of all other matters of fact, we can here lay down the rule that if the evidence is so clear that no reasonable man would determine the issue before the court in any way but one, the court will itself determine the issue, either by directing the verdict or by dispensing with any verdict whatever. By this statement, however, we do not say that if no reasonable man would have used the words with any but one meaning, that meaning will be adopted by the court without aid from the jury. * * * "

To demonstrate its finding of unreasonableness, the Circuit Court notes that it would be impossible to deter-

mine which of the contracting parties would be permitted to choose the "optional period" to be waived. On its face this uncertainty produces an ambiguity. Then the Circuit Court recognizes, as did the District Court, the inartful use of the word "or" instead of "and", yet concludes that the context and circumstances show that the conjunctive meaning is implicit. (Appendix A, p. 6a)

Referring again to the particle "or" treated so extensively in Circuit Court's opinion: Singularly, misuse of the word "or" was condemned by the senior Justice Harlan in *Travers* v. *Reinhardt,* 205 U.S. 23 and the second Justice Harlan in *De Sylva* v. *Ballentine,* 351 U.S. 570 respectively. Also see *Robert Dumont* v. *United States,* 98 U.S. 142. In all three cases this Court carefully considered the intentions of the parties.

It is an accepted principle in interpretating a release that general words of release are limited always to that thing or those things which were in contemplation of the parties at the time of giving the release. *Fire Ins. Ass.* v. *Wickham,* 141 U.S. 564. Surely, Petitioner taking less deductions than it was entitled for 1964 was not contemplated by either party.

Notwithstanding District Court's finding, Jury's verdict and an exhaustive examination of all aspects of the compromise agreement by the Tax Court of the United States (52 TC 420), the Circuit Court has summarily dismissed the Petitioner-Taxpayer. Obviously the Circuit Court was influenced by the ratio of the tax liabilities compromised to amount to be paid by Petitioner under the offers in compromise. In effect, the Circuit Court's opinion says that Respondent is equitably justified in retaining this overpayment resulting from Petitioner's failure to claim correct deductions for 1964, thus overlooking the apparent

inquities of the unjust enrichment inuring to Respondent due solely to Petitioner claiming less tax deductions than it was entitled to for 1964. The equities were not in issue in the District Court and should not be an issue on appeal.

The ruling of the Circuit Court makes a form used by the Internal Revenue Service unassailable by taxpayers, notwithstanding the fact that ordinary litigants would be required to submit a controversy of this character to a jury for determination. "The very essence of the jury's functions is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Baker* v. *Texas Pacific Railway Company,* 359 U.S. 227, 229.

CONCLUSION

For these reasons: a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2827

ROBBINS TIRE AND RUBBER COMPANY, INC., *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Alabama

(June 13, 1972)

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

CLARK, Circuit Judge: The contract interpretation issue in this appeal arose in the context of a tax claim settlement. Finding that only one reasonable meaning may be ascribed to the compromise offer and acceptance agreement of the parties, we reverse the action of the trial court in treating the contract as ambiguous and in submitting the issue of its interpretation to jury resolution.

Robbins Tire & Rubber Company (Taxpayer), an Alabama corporation, chose to file its tax returns on a September 30th fiscal year basis. During its 1942-1963 operations, Taxpayer incurred unpaid liability claims for (1) income, excess profits and other related taxes together with penalties and interest totaling 4,722,202.44 dollars, and (2) ex-

cise taxes, and related penalties and interest totaling 5,545,170.07 dollars. In December 1963, settlement conferences were held between representatives of Taxpayer and the Commissioner of Internal Revenue (Commissioners). On March 12, 1964, Taxpayer wrote the following letter to the Birmingham, Alabama District Director:

> Re: Robbins Tire & Rubber Company, Inc. Claims for Refund
>
> Dear Sir:
>
> The above named taxpayer has submitted offers in compromise to you for settlement of its tax liabilities to September 30, 1963.
>
> In connection with said offers and as additional consideration, we agree to withdraw all claims for refund filed by this corporation upon the acceptance of said offer and the related offer of Poncet Davis, Sr. If said offers are rejected, this agreement shall be of no effect and, upon rejection, is withdrawn.
>
> It is our intention to waive and withdraw any and all claims which have been made by this corporation together with any and all claims which could be made by us in respect to any of the taxable years covered by the offers in compromise. Without limiting the above offer to withdraw claims for refund, the following specific claims are withdrawn:

Period	*Type Tax*	*Amount of Claim*
10-1-50 to 9-30-51	Income	$ 129,821.44
10-1-55 to 10-30-56	"	361,279.63
10-1-56 to 10-30-57	"	159,997.98
10-1-57 to 10-30-58	"	198,536.00
10-1-58 to 10-30-59	"	267,754.69
10-1-59 to 10-30-60	"	59,770.75
10-1-60 to 10- 1-61	"	32,329.39
		$1,209,489.88

On March 19, 1964, Taxpayer filed a formal offer in compromise, dated September 30, 1963, to proffer (1) 517,782.16 dollars in settlement of its income, excess profits and related tax liabilities; (2) 423,640.34 dollars in satisfaction of excise taxes, penalties and interest; and (3) an agreement to pay the district director a specified percentage of Taxpayer's future annual income over 25,000 dollars in each of the succeeding nine taxable years. All payments, present and future, were to be subject to the terms of the trust agreement which was in effect between Taxpayer and the district director. Along with the tender of these monetary sums, Taxpayer executed Internal Revenue Department Form 656 entitled "Offer in Compromise". Paragraph 3 of that printed form reads as follows:

> 3. In making this offer, and as a part consideration thereof, the proponent [Taxpayer] agrees (a) that all payments and other credits heretofore made to the account(s) for the period(s) covered by this offer shall be retained by the United States; and (b) that any and all amounts of money to which the proponent may be entitled under the internal revenue laws, due through overpayments of any tax or other liability, including interest and penalties, made for periods ending prior to or during the calendar year in which this offer is accepted, as are not in excess of the difference between the liability sought to be compromised and the amount herein offered, shall also be retained by the United States. Any such refund received after the filing of this offer will be returned immediately to the office of the District Director.

On May 1, 1964, the Commissioner accepted Taxpayer's offer.

On December 16, 1964, Taxpayer filed its income tax return for the fiscal year ended September 30, 1964. On that 1964 tax return Taxpayer failed to claim certain deductions to which the parties now concede it was entitled.

A later controversy about these deductions eventuated in a Tax Court opinion favorable to Taxpayer, which determined that an overpayment had been made on this return in the amount of 139,189.60 dollars. The Tax Court ruled that it had no jurisdiction to determine whether a refund of this overpayment of tax was barred by the terms of the compromise agreement. Taxpayer thereupon brought the present litigation seeking to recover the refund of the overpayment established.

The lower court held that the language of Paragraph 3(b) of Form 656 rendered the offer in compromise ambiguous and therefore refused to grant summary judgment to the United States and permitted Taxpayer to introduce parol evidence of the intentions of its representatives at the time of making the offer. Both parties were also permitted to produce "expert" testimony as to the technical meaning of the above quoted language from Form 656. The court then submitted to a jury the determination of whether the contractual settlement undertaking included a relinquishment of the 1964 overpayment. The jury determined that it did not. Judgment on that verdict in Taxpayer's favor provoked this appeal.

The Commissioner contends that the language of the offer in compromise which it accepted is unambiguous and that the United States was entitled to a directed verdict. In order for an ambiguity to exist in the government's printed form which Taxpayer was required to submit, it would have to be reasonable to read the form as having given Taxpayer two distinct options—either to relinquish to the United States all overpayment claims for the periods ending prior to the year in which the offer was accepted *or* to give up any overpayment it might make for the calendar year during which the offer was accepted. Our decision turns upon whether such an alternative interpretation can be judicially determined to be reasonable. We hold that it cannot, and that the court erred in submitting any issue to a jury in this cause.

Normally the interpretation of an undisputed contractual undertaking is to be resolved by the court as a matter of law. However, where the court determines that the words chosen to form an agreement indicate that reasonable men, situated as the contracting parties were, could reach more than one conclusion as to what the bargain was, determination of the intention of the parties is an issue of fact for the jury, if one has been demanded. *Fujimoto* v. *Rio Grande Pickle Co.*, 414 F.2d 648 (5th Cir. 1969); *Freeman* v. *Continental Gin Company*, 381 F.2d 459 (5th Cir. 1967); *Ammons* v. *Frankline Life Ins. Co.*, 348 F.2d 414 (5th Cir. 1965); *United States* v. *Taylor*, 293 F.2d 717 (5th Cir. 1961).

Even if we were to agree that it would be literally possible to read Paragraph 3(b) as a disjunctive offer by a taxpayer proposing a settlement to forego overpayment claims either (a) for all periods ending prior to the calendar year of acceptance or (b) only for periods ending during that calendar year, assigning such a meaning to the offer of compromise in the case at bar results in a wholly unreasonable construction of its terms under the circumstances present here. Taxpayer offered monetary payments approximating only about 10% of the tax liabilities claimed, based upon inability to pay the whole claim. Prior to its submission of this offer and the Commissioner's acceptance, Taxpayer had written a letter setting out its willingness to waive and withdraw all prior period overpayment claims, including certain specified prior claims totaling in excess of 1,200,000 dollars. Yet the "alternative" interpretation of its offer in compromise, which offer the Commissioner accepted, might permit Taxpayer to deliberately or inadvertently incur a minimal overpayment later in the year of acceptance and then choose to substitute such single overpayment claim for these much larger prior period claims, or would give the Commissioner the election of renouncing the right to retain the conceded claims and hold a subsequent potentially greater overpayment. To further

demonstrate the inherent unreasonableness of adopting such an interpretation, we note that it would be impossible to determine which of the contracting parties would be permitted to choose the "optional" period to be waived and when that choice would have to be made. No such unreasonable interpretation may serve to create ambiguity. Restatement of Contracts § 236(a) (1932); Williston on Contracts § 620 (3rd ed. 1961).

Paragraph 3(b) might be subject to criticism for its inartful use of the word "or", instead of "and" (or the technical catch-all "and/or"), between the prior and present tax periods described. However, the context of the entire document and the circumstances under which the offer was submitted show that the conjunctive meaning is implicit and that any reasonable person in the position of the parties must have so understood it.

Though Taxpayer lays heavy stress on its letter of March 12, 1964, we find that it neither indicates nor compels a contrary conclusion. The only income tax returns which were to be filed in the calendar year in which the offer in compromise was submitted were not due until after the closing of Taxpayer's fiscal year ending September 30, 1964. The statement in the March 12 letter of Taxpayer's intention to waive and withdraw all known refund claims cannot logically be construed to have excluded a claim related to a tax return not yet filed and not then due. Indeed, the language of the offer in compromise can reasonably be construed to merely broaden the intent expressed in the letter to include not only waiver of past overpayments but also to agree to permit the Commissioner to retain any overpayment for an additional period—the calendar year in which the offer was accepted. Since the return due in the 1964 calendar year had not yet been made, much less been made incorrectly, it most surely cannot be seriously contended that the March 12 letter constituted an election to waive only refunds for prior periods as op-

posed to an election to waive a potential later overpayment of 1964 taxes before any such overpayment could be known.

We do not fault the district court for considering all of the background and circumstances against which the offer in compromise was made and accepted, including the March 12 letter and any other testimony of the contracting parties which established the context of the bargaining. However, since we have determined as a matter of law that no ambiguity existed in the contractual writings, it was error to have received testimony as to the intention of one of the parties, *Freeman* v. *Continental Gin Co.*, *supra*, or the opinions of "experts" as to the meaning of the offer's wording.

If the Commissioner was not entitled to summary judgment, he most surely was entitled to a directed verdict. We reverse the judgment in favor of Taxpayer and remand the cause to the district court with directions to enter judgment for the United States.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 24, 1972

EDWARD W. WADSWORTH, CLERK
ROOM 408 - 400 ROYAL ST., NEW ORLEANS, LA. 70130

West Publishing Company
50 W. Kellogg Boulevard
St. Paul, Minnesota, 55102

Re: No. 71-2827 (Slip dated June 13, 1972)
Robbins Tire and Rubber Company, Inc.
v. United States of America

Gentlemen:

Prior to publication of this opinion, please make the following changes which are also noted on the attached copies of the pages to be corrected.

At Page 2, Line 13:

Delete the word "Commissioner", and insert therefor the words "Birmingham, Alabama District Director";

At Page 5:

That part of the second sentence of the last paragraph before the dash should be revised to read:

"In order for an ambiguity to exist in the government's printed form which Taxpayer was required to submit, it would have to be reasonable to read the form as having given Taxpayer two distinct options—";

At Page 5, beginning next to last line from bottom of page:

Delete the words "The sole issue we need reach is", and insert therefor the words "Our decision turns upon";

At Page 6, beginning 3rd line from bottom of page:

Delete the words "its submission of this offer and";

At Page 7, Line 4:

Delete the words "it urges be applied to", and insert therefor the word "of"; also delete the word "later";

At Page 7, Line 5:

Add a comma after the word "compromise", and add the word "offer" after the word "which";

At Page 7, Line 14:

Delete the words "Taxpayer's assertedly ambiguous", and insert therefor the words "adopting such an";

At Page 8, Line 3:

Insert the word "income" after the word "only";

At Page 8, Lines 11 & 12:

Delete the words "the letter is completely consistent with";

At Page 8, Line 13:

Delete the words "submitted one week later. The latter";

At Page 8, Line 15:

Delete the word "former", and insert therefor the word "letter";

At Page 8, Lines 25 & 26:

Delete the words "even before the offer allegedly creating the 'option' had been tendered and";

At Page 8, Lines 26 & 27:

Delete the words "the alternative", and insert therefor the words "any such".

Yours very truly,

EDWARD W. WADSWORTH, Clerk

By /s/ DONNA PROTIE
Donna Protie
Deputy Clerk

CC: TO ALL COUNSEL OF RECORD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2827

ROBBINS TIRE AND RUBBER COMPANY, INC., *Plaintiff-Appellee,*

v.

UNITED STATES OF AMERICA, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Alabama

---

(August 24, 1972)

ON PETITION FOR REHEARING

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX B

Constitution of the United States

AMENDMENT VII—CIVIL TRIALS

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Title 28, § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

Title 28, § 2402. Jury trial in actions against United States

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a) (1) shall, at the request of either party to such action, be tried by the court with a jury. June 25, 1948, c. 646, 62 Stat. 971; July 30, 1954, c. 648, § 2(a), 68 Stat. 589.

Federal Rules of Civil Procedure

Rule 38. Jury Trial of Right

(*a*) *Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(*b*) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor a writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(*c*) *Same; Specification of Issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(*d*) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(*e*) *Admiralty and Maritime Claims.* These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

As amended Feb. 28, 1966, eff. July 1, 1966.

Federal Rules of Civil Procedure

Rule 52. Findings by the Court

(*a*) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings o the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(*b*) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Title 26, § 7122. Compromises

(*a*) *Authorization.*—The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) Record.—Whenever a compromise is made by the Secretary or his delegate in any case, there shall be placed on file in the office of the Secretary or his delegate the

opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $500. Aug. 16, 1954, c. 736, 68A Stat. 849.

FOLDOUTS TOO LARGE TO BE FILMED

FORM 656 (REV. 7-57)	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE **OFFER IN COMPROMISE**	To be filed in duplicate with District Director

NAME(S) AND ADDRESS OF TAXPAYER(S) | FOR USE OF DISTRICT DIRECTOR

(If space is insufficient attach supporting statement)

6. The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter.

7. It is understood that this offer will be considered and acted upon in due course and that it does not afford relief from the liability sought to be compromised unless and until it is actually accepted in writing by the Commissioner or his duly authorized representative, and the terms of the offer have been fully complied with.

Waiver of statutory period of limitations is hereby accepted by the undersigned:	I declare under the penalties of perjury that this offer (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.
DISTRICT DIRECTOR OF INTERNAL REVENUE *(Enter name)*	SIGNATURE(S) OF PROPONENT(S) ROBBINS TIRE AND RUBBER COMPANY, INC. By
BY *(Signature and title)* / DATE	President

15a

APPENDIX C

In the Supreme Court of the United States

OCTOBER TERM, 1972

ROBBINS TIRE & RUBBER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue an opinion. The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 462 F. 2d 684.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1972 (Pet. App. 1a). A timely petition for rehearing was denied on August 24, 1972 (Pet. App. 10a). The petition for a writ of certiorari was filed on November 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

492-238—72

QUESTION PRESENTED

Whether under the terms of a 1964 compromise settlement of petitioner's unpaid tax liabilities, petitioner waived its right to a refund of any overpayment otherwise due it for the calendar year in which the offer was accepted.

STATEMENT

Over a period of years from 1942 through 1963, petitioner incurred liabilities for (1) income and excess profits taxes together with penalties and interest totalling $4,722,202.44, and (2) excise taxes and related penalties and interest totalling $5,545,170.07. On March 19, 1964, petitioner filed a formal offer in compromise, based on "inability to pay," proposing to pay a total of $941,422.50 plus a specified percentage of the amount by which its annual income exceeded $25,000 during each of the succeeding nine taxable years (Pet. App. 1a–3a).

Petitioner submitted the offer on Internal Revenue Department Form 656 entitled "Offer in Compromise," paragraph 3 of which reads in pertinent part as follows (Pet. App. 3a):

> 3. In making this offer, and as a part consideration thereof, the proponent [petitioner] agrees • • • (b) that any and all amounts of money to which the proponent may be entitled under the internal revenue laws, due through overpayments of any tax or other liability, including interest and penalties, made for periods ending prior to or during the calendar year in which this offer is accepted, as are not in excess of the difference between the liability sought to be

> compromised and the amount herein offered, shall also be retained by the United States. * * *

Petitioner also stated in a letter its intention to waive and withdraw all claims for refund which had been made or could be made with respect to the taxable years covered by the offer and specifically setting forth a number of such existing claims to be withdrawn. On May 1, 1964, the Commissioner accepted petitioner's offer (Pet. App. 2a–3a).

Subsequently, petitioner contested in the Tax Court a deficiency asserted against it for its fiscal year ending September 30, 1964. The Tax Court determined that petitioner had made an overpayment of $139,189.60 for that year. Since the Tax Court has no jurisdiction to order a refund, petitioner brought the instant proceeding in the United States District Court for the Northern District of Alabama, seeking a refund of that overpayment. The government urged that, under the terms of paragraph 3(b) of the offer in compromise, the petitioner had waived its right to refund of any overpayment otherwise due it for the calendar year in which the settlement was made (Pet. App. 3a–4a).

The district court, after holding that the language of paragraph 3(b) was ambiguous, allowed the petitioner to introduce parol evidence of its intentions concerning the offer, and submitted to a jury the question whether petitioner was barred by the settlement agreement from receiving a refund for 1964. The jury found in petitioner's favor (Pet. App 4a).

On appeal, the court of appeals held that the construction of paragraph 3(b) urged by petitioner was unreasonable and that the district court had erred in treating the agreement as ambiguous and in submitting the issue of its interpretation to the jury. The cause was remanded with directions to enter judgment for the United States (Pet. App 6a–7a).

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

1. In May 1964, petitioner entered into a compromise agreement with the Commissioner of Internal Revenue whereby more than $10 million of petitioner's unpaid tax liabilities was abated. The basis for this settlement was petitioner's claimed inability to pay. As part of the consideration to the government for abatement of its unpaid tax liabilities, petitioner agreed that any and all overpayments "made for periods ending prior to or during the calendar year in which this offer is accepted," would be retained by the United States. Thus petitioner waived its rights to any refund of overpayments for taxable periods ending up to and during the calendar year 1964.[1] The

[1] Petitioner urges that the use of "or" in paragraph 3(b) sets forth two distinct options whereby the United States might retain only (1) all overpayments made for periods ending prior to the year in which the offer was accepted *or* (2) any overpayment made for a period ending during the calendar year in which the offer was accepted, but not both. This construction was correctly determined by the court of appeals to be unreasonable (Pet. App. 6a). The use of the word "or" in the context of paragraph 3(b) indicates simply and clearly that

overpayment petitioner now seeks to have refunded is for its taxable year ending September 30, 1964. Since petitioner's offer in compromise was accepted (and also made) during 1964, this overpayment is one which the United States is entitled to retain under paragraph 3(b) of the settlement agreement.

2. The decision below works no injustice on taxpayers who execute compromise agreements with the government (Pet. 8). A taxpayer in its settlement offer may renounce any right to claim a refund for specified periods. See, *e.g., Cooper Agency* v. *United States,* 301 F. Supp. 871 (D.S.C.), affirmed, 422 F. 2d 1331 (C.A. 4); *Walker* v. *Alamo Foods Co.,* 16 F. 2d 694 (C.A. 5). Nor is the government given a windfall. The amount which the United States can retain under paragraph 3(b) is limited by the amount of tax liabilities which were abated under the settlement.

3. Finally, the law regarding the interpretation of written contracts is clear. The intention of the parties to a written contract must be derived from the language of the contract. *Jurs* v. *Commissioner,* 147 F. 2d 805 (C.A. 9); *Hawkeye Commercial Men's Ass'n* v. *Christy,* 294 Fed. 208 (C.A. 8). See, generally, Williston, *Contracts* (3d ed.) § 610. Where the terms of the contract are unambiguous, the determination of its

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overpayments made for any period ending prior to the next preceding calendar year could be retained by the government. Use of the word "and" in this context would have been technically incorrect and confusing, for a taxable period could not end both prior to *and* during a calendar year; a taxable period may only end either prior to *or* during a particular calendar year.

meaning is a question of law and should be decided without resort to extrinsic evidence.[2] See, *e.g.*, *United States* v. *Waterman Steamship Corp.*, 397 F. 2d 577 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

BENNET N. HOLLANDER,
ANN BELANGER,
Attorneys.

JANUARY 1973.

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[2] Petitioner's letter of March 12, 1964, on which it relies (Pet. 4), merely specified the claims known at that time which would be withdrawn pursuant to the terms of the settlement. An overpayment made during the year in which the offer was accepted could not have been so specified, because both the calendar year in which the offer would be accepted and the existence of any claim for overpayment for the then current taxable year could not then be known. Moreover, nothing in the letter repudiated that part of the agreement giving the government the right to retain any overpayment for the taxable year ending during the calendar year in which the offer was accepted.

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